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THE LAW AND PRACTICE OF CONNECTICUT CONCERNING HEARING IN DAMAGES ON DEFAULT, OR DEMURRER OVERRULED.

Necessarily, we in this State are so satisfied with the law and practice pertaining to hearing in damages on default and demurrer overruled, in actions sounding in tort for unliquidated damages, that we forget that such law and practice are peculiar to this State.

Whether the law and practice are founded on logical reasons or not, they have proved in fact very beneficial in their operation. The most frequent instance of their application is in actions for negligence. If we should go into the courts of adjoining States or England, we should find as a rule, actions for negligence tried to a jury, with liberal verdicts for the plaintiff. In this State such actions are generally tried to the court without the aid (or annoyance, as you please) of a jury. As in other States, so here the student will notice that such actions are tried on their merits. In our State the plaintiff is sure to recover a nominal sum, and in a majority of cases fails to recover more than a nominal sum; while in other States the jury is found to sympathize with the plaintiff more than with the defendant.

How did the rule and practice arise in this State?

In order to answer that question it is necessary to state the condition of a case after default, and after a demurrer overruled.

When a defendant has been summoned into court in any jurisdiction—especially so in this State, where, with the summons, there is left with him a copy of the complaint—and he fails to appear, or if appearing, fails to answer to the complaint, he is

said to be in "default." His attitude toward the case and court is such that he is regarded as desiring to make no contest over the allegations of the complaint, or over the assumptions of law upon which such allegations are based. Everywhere, as is believed, save in Connecticut, such an attitude on the part of such defendant is regarded by the Court as a conclusive admission of the truth of the well pleaded allegations of the complaint, and as entitling the plaintiff to a judgment for damages measured by the extent of the injury.

In Connecticut also, in such cases of default, the plaintiff is entitled to a judgment of some sort, the nature of which will be discussed after we have brought into view the condition of a cause after a demurrer overruled.

When a defendant has been summoned into Court as above stated and desires to contest the suit, it is obvious that he may dispute the assumptions of law contained in the plaintiff's case, or question his allegations of fact. If he undertakes to dispute the questions of law on which the plaintiff's complaint is based, his method is by demurrer. If he wins the point his demurrer is said to be "sustained." If he loses, the demurrer is said to be "overruled." Thus far he has confined his attack upon the plaintiff's case solely to the questions of law supposed to be involved therein.

Now comes in a very interesting point, which illustrates the length of time over which a peculiar practice may extend. By the very old common law, the defendant in actions at law was restricted to one substantial matter of defense. He could come in and demur to the "declaration." If his demurrer was overruled, final judgment went against him for the narrow and technical reason, that by electing to demur he had exhausted his one opportunity of defense, and so had admitted the allegations of the declaration, and could not afterwards contest them. In other words, upon a demurrer overruled the old common law placed the defendant in a condition of being in default, with reference to the allegations of fact contained in the declaration. In the technical default, the defendant has declined answering the allegations of the declaration or complaint. In the case of a demurrer overruled the defendant by his own choice, according to the principles of the ancient common law, has lost the opportunity of answering the allegations of the complaint.

It is very true that courts almost universally permitted the defendant after demurrer overruled to plead anew with reference to the matters of fact alleged in the complaint, but this was done

purely as a matter of privilege to the defendant (Falken *v.* Housatonic R. R. Co., 63 Conn. 262).

"The practice is undoubtedly more liberal in allowing a change of plea in the case of a demurrer overruled, than in allowing amendments to declarations which have been held to be insufficient; but in both cases it is a matter of discretion with the Court" (McAllister *v.* Clark, 33 Conn. 253, in which case the motion to plead anew after demurrer overruled was denied).

Although the statute now makes it peremptory upon the court to permit a defendant to plead anew after demurrer overruled, it still remains optional with the defendant to further plead or not as he chooses. If he does not further plead, then he is regarded as standing before the court with no answer to the allegations of fact in the complaint. His attitude toward the court and case is, for all the purposes of this article, identical with that of a defaulting defendant; in each case the law awards a judgment in favor of the plaintiff against the defendant.

On what ground does the judgment proceed?

Herein lies the mystery. It would seem as matter of logic that the judgment ought to proceed upon the theory that the allegations of the complaint setting up a cause of action were admitted, fully and completely. On what other theory can a court of justice render a judgment in favor of one man against another, except that the one man has maintained or established his cause of action against the other man?

It necessarily results that if the defendant will make no answer to the allegations setting up the cause of action in the complaint, a court may well say that thereby such allegations are established in a very satisfactory manner—in a manner of which the defendant at least, cannot complain.

The general rule of the effect of a default in actions of tort is stated in the "American and English Encyclopedia of Law," volume 5, page 63, as follows:

"A judgment by default in favor of the plaintiff admits the defendant's liability to some damages, but the amount is a matter of proof. The defendant is, therefore, not entitled to *deny the plaintiff's cause of action*, but he may offer evidence in mitigation of damages."

In the case of Lambert *v.* Sanford, 55 Conn. 437, referring to 1 Sutherland on Damages, page 777, it is said:

"It is generally held that on an assessment of damages after default or on an equivalent state of the record, evidence denying the cause of action, or tending to show that no right of action

exists, is inadmissible in mitigation of damages. When an action is brought on a contract set out in the declaration, and there is a default on the assessment of damages, no evidence which goes to deny the existence of the contract, or tends to avoid it, is competent; the default admits it as set forth, and concludes the defendant from denying it."

The opinion proceeds as follows:

"In this State in some actions of tort, notably in actions in which negligence is of the gist of the action, evidence in mitigation of damages, which evidence also tends to show the non-existence of some material element of the cause of action, is permitted. But this rule never has been extended to actions upon express contracts set forth in the complaint."

Thus it is seen that in this State courts have arbitrarily drawn a distinction between the effect of a judgment by default or on demurrer overruled, with reference to a cause of action in contract, and one sounding in tort for unliquidated damages.

It may be asked why should the effect of judgments by default in the one class of actions be different from the effect of judgment by default in the other class of actions.

In actions of tort, where the plaintiff obtains against the defendant a valid judgment by default or on demurrer overruled, it is hard, by the rules of logic, to find on what ground such judgment can rest, except it be upon the cause of action stated in the complaint. Necessarily the damages are unliquidated. The defendant has never agreed what the damage was, and the plaintiff desires to show the extent of his injuries, in order to establish the amount of his recovery. If he shall fail to establish any injury the law would presume some damage, because of the conceded violation by the defendant of the plaintiff's rights. When, however, the question of the extent of the plaintiff's injuries is to be tried, it seems anomalous for the court to render judgment, not for the actual damages shown, but for some nominal damages, because, forsooth, the defendant has been able to show that the plaintiff never had any case at all, although he has obtained a valid judgment.

In order to try to understand this matter it is necessary to refer to some of the important cases in which the law and practice of the State of Connecticut on this subject have been established.

The leading case is that of Havens *v.* Railroad Co., 28 Conn. 69, decided in 1859.

Here the points, so far as I can find, were first established

that in a hearing in damages on default, or demurrer overruled, the truth of the allegations of the complaint setting forth the cause of action can be attacked, notwithstanding the judgment; that the judgment arising from the default, or demurrer overruled is, *prima facie*, only a judgment for nominal damages, and that whatever be the basis of such judgment, it does not conclusively settle the truth of the plaintiff's allegations concerning his cause of action.

"Nominal damages mean no damages at all. In the quaint language of an old writer, they are 'a mere peg to hang costs on.' They are such as are to be awarded in a case where there has been a breach of a contract, and no actual damages whatever have been or can be shown" (Stanton *v.* R. R. Co., 59 Conn. 282).

So the judgment by default or demurrer overruled in actions of tort, for nominal damages, in this State is not much of a judgment, though it has some virility, as will be shown later.

The practical effect, however, of Havens *v.* Railroad Co. was to cause these actions in tort to be tried to the court and not to the jury, since in this State, from time immemorial, hearings in damages on default or demurrer overruled could only be to the court, except as modified in a very recent statute, concerning notice of intention to default, which has not materially changed the course of procedure.

The doctrine first established in Havens *v.* R. R. Co. was vigorously contested for many years. Perhaps it receives its best and clearest statement in the case of Batchelder *v.* Bartholomew, 44 Conn. 501:

"From a time early in the history of the jurisprudence of this State, the law has been, that where in an action on a case for the recovery of unliquidated damages, the defendant has suffered a default, that is, has omitted to make any answer, the assessment of damages has been made by the court without the intervention of a jury; also, that by his omission to deny them, the defendant is held to have admitted the truth of all the well-pleaded material allegations in the declaration, and the consequent right of the plaintiff to a judgment for a limited sum, that is for nominal damages and costs, without the introduction of evidence. The defendant standing silent, the law imputes the admission to him, but it does it with this limitation upon its meaning and effect, it does it for this special purpose and no other, and our courts have repeatedly explained that the admission found in a default is not the admission of which the writers

on the law of evidence treat. The silent defendant having been subjected to a judgment for nominal damages, from which no proof can relieve him, the default has practically exhausted its effect upon the case; for if the plaintiff is unwilling to accept this judgment evidence is received on his part to raise the damages above, and on the part of the defendant to keep them down to that immovable base of departure, the nominal point, precisely as if a general issue had been pleaded, and although the evidence introduced by the latter has so much force that it would have reduced them to nothing but for the barrier interposed by the default, it cannot avail to deprive the plaintiff of his judgment; in keeping that, the law perceives that he has all that the truth entitles him to, and therefore refuses to hear any objection from him. *Of course the Court might have said that if the defendant thus defaults he shall not hereafter be heard in proof or argument upon any other than the single question as to the extent of the injury inflicted*, but it has contented itself with saying that if he stands silent the law will pronounce judgment upon him for nominal damages; *in either form, the rule, like all other rules of practice, is arbitrary in its nature, but in neither is there any inconsistency or want of logic.* If in our courts the admission in a default had ever been used in the broadest sense of which the word is capable, then, of course, any limitation thereafter put upon it would have been an inconsistency, but from the earliest use, the narrower meaning went with it" (citing no case or authority prior to Havens *v.* Railroad Co.).

It will be observed that the rule of Connecticut is correctly asserted to be a rule of practice, and arbitrary in its nature; but when the court says that there is neither inconsistency or want of logic in the rule, the inquiry may be properly made, how a judgment by default conclusively establishes the truth of the allegations of the cause of action in an action of contract, and does not so conclusively establish them in an action of tort?

The practice under the rule of Connecticut was, at the outset, somewhat uncertain. Should the plaintiff in these actions of tort introduce his whole case in chief, the same as if there had been no default, or should he confine himself to the extent of the injury? In some counties the practice was one way, and in some the other, and some lawyers in the same county tried their cases in one way, and some in the other.

In Daniels *v.* Saybrook, 34 Conn. 377, the court apparently decided the question: holding that the effect of a judgment by default or upon demurrer overruled, was such as to confer upon

the plaintiff, *prima facie*, the right to his full damages, and requiring him upon the hearing to show in the first place only the amount of such damages; making it, however, only a question of the burden of proof, and throwing upon the defendant the burden of proving that the plaintiff had no cause of action, in case such was the real defense of the defendant.

This case was decided in 1867, yet notwithstanding the decision the practice continued more or less uncertain until the decision of Crane *v.* Eastern Transportation Line, 48 Conn. 361, decided in October, 1880. It is now well settled in this State that the Connecticut rule and practice on these hearings in damages, after a judgment by default, or demurrer overruled, are that the plaintiff is *prima facie* entitled to recover his full damages, and on such hearings, offers in chief only evidence as to the extent of his injury, while the defendant is at liberty to show that the plaintiff never had any cause of action at all; the burden of proof in this respect being upon him.

In other words, we have established in Connecticut a most peculiar form of judgment by default or demurrer overruled in actions of tort for unliquidated damages. *Prima facie*, and in a peculiar way, such judgment establishes the truth of the allegations of the complaint concerning the cause of action. In point of fact, it probably establishes nothing of the kind. In point of logic the inquiry must arise, "How can a judgment *prima facie* establish anything?" The general conception of a judgment is that it is conclusive, or is nothing.

It was contended at one time, that the allegations of the complaint, after default, or demurrer overruled, might be regarded as *prima facie* evidence of the facts therein asserted, so that if the defendant failed to negative such allegations in his defense, such allegations might be regarded as sufficient proof of such facts. The Supreme Court, however, says that such is not the law; that the allegations of the complaint in such cases are not to be taken as evidence in any manner; they probably are true, for purposes of the burden of proof, but such probability vanishes when the defendant attempts, however unsuccessfully, to disprove them (Nolan *v.* R. R. Co., 53 Conn. 461; Crogan *v.* Schiele, 53 Conn. 186).

While the practical effect of the Connecticut rule and practice with reference to the judgment by default or demurrer overruled, is beneficial, I cannot subscribe to the assertion that it is entirely logical and consistent with other established rules and maxims.

It is a case of a *prima facie*, probably correct judgment, which the defendant, however, is allowed to prove the plaintiff was never entitled to obtain, but which, even then, the defendant may not be able to wholly set aside, but must suffer, for an amount which is now expressed by the phrase "nominal damages."

In its final form, if the plaintiff is successful, it is the ordinary judgment by default for the plaintiff to recover damages measured by the extent of his injuries.

In its final form, if the defendant is successful, it is a judgment for the plaintiff to recover "nominal damages," not because the plaintiff has proved a violation of his rights and shown no injury, for in such cases the defendant has not violated the plaintiff's right, and the plaintiff has usually suffered considerable damage. It is not a judgment against the defendant, because he has not filed an answer to the allegations of fact in the complaint, for he may "default" after filing such answer, and be dealt with as is usual in cases of default (Lennon *v.* Rawitzer, 57 Conn. 583).

I have never been able to satisfactorily define the rules of law and practice of this State, on this subject, in any other manner than to say that they are arbitrary and constitute a system of judicial procedure peculiar to this State, in actions in tort for unliquidated damages.

A curious illustration of the rule is found in Martin *v.* New York and New England Railroad Company, 62 Conn. 331; an action against a railroad company for communicating fire from its locomotive engine to adjoining property. In this case it is held that the liability of a railroad company in such case is statutory and does not depend upon the existence of negligence.

The complaint alleged that fire was communicated to the plaintiff's property by a locomotive engine of the defendant, and that the property was destroyed by fire. The defendant suffered a default, and the case was heard in damages. Held, that the plaintiff was, *prima facie*, entitled to recover her actual loss from the fire, to the full extent proved, but the defendant, to reduce the damages to a nominal sum, might show that the fire was not communicated by its locomotive; in other words, the default did not conclusively admit the vital allegations of the complaint, that the fire came from the locomotive engine of the defendant, and this in a statutory action, where negligence of the defendant need not be alleged or proved.

Obviously the extent to which the rule will be applied in Connecticut is as yet unknown.

It would seem as if in actions of slander and libel the defendant could default or demur, and on a hearing in damages on such default or demurrer overruled, could show that he never uttered the slanderous words, or published the libellous matter.

For some years the General Assembly has made it a condition precedent to suits brought against municipal and other corporations that notice of the time and place of the injury must be given by the plaintiff within a limited time, to the defendant.

In an action against the City of New London the complaint alleged the giving of sufficient notice. The case was defaulted. On the trial of the case the defendant offered in evidence the notice which in fact had been given, and which was defective; a fact which would have entitled the defendant to a judgment in its favor, if the case had been tried, whether to court or jury.

What was the effect of the default upon the sufficient allegation of the complaint concerning notice?

A result was reached by which the plaintiff was entitled to a judgment for nominal damages by virtue of the default, and the defendant could attack the allegations of notice in the complaint, notwithstanding his default with reference to it. As this decision was in 1893, it is well to quote from it:

"This makes it necessary to consider very briefly what matters, in cases like the one at bar, under our practice, may be contested by the defendant upon a hearing in damages, after default, or demurrer overruled, for the purpose of keeping the damages down to a nominal sum. As a general proposition, it must now be regarded as conclusively settled that the defendant in such cases, and for such purposes, may contest his liability for any damages whatsoever; may show if he can, that the plaintiff is entitled to nominal damages only, because in reality, and but for the default or demurrer, he is entitled to none; may offer evidence in effect tending to prove such non-liability, as if no demurrer had been introduced, or default had been suffered, although such fact as a basis for nominal damages had been conclusively admitted. * * * For the purposes indicated and after default suffered or demurrer overruled, the defendant has been permitted to show that an assault by servants of a railroad company was justifiable, and so was in law no assault" (apparently rendering pleadings or notice of special defense wholly unnecessary) " * * * that a claimed trespass was in law no trespass, because the acts were done under a contract with the plaintiff, which amounted to a license."

Now a license surely may not ordinarily be offered in evi-

dence by the defendant except by way of special defense, but apparently it is permissible on a hearing in damages.

It seems to me that it would have been more logical, and more consistent, if the Supreme Court had ruled that the default or demurrer overruled admitted nothing with reference to the merits of the case, and left the burden of proof with the plaintiff to make out his claim for substantial damages.

I think also that the early case of Lamphear *v.* Buckingham, 33 Conn. 237, is not in harmony with the later decisions. That was a case of an administrator suing a railroad company (operated by Buckingham and others, trustees) for the loss of the life of the intestate, through the negligence of the railroad company. If the case for negligence was made out the statute fixed the sum to be recovered, as not less than one thousand dollars nor more than five thousand dollars.

On a hearing in damages on demurrer overruled the Court found that the railroad company was not guilty of any negligence, and fixed fifty dollars as the "nominal damages." The Supreme Court decided that the judgment for nominal damages on the demurrer overruled, was at least one thousand dollars.

Thus in this case the judgment for nominal damages assessed at fifty dollars, became in fact a judgment for substantial damages of one thousand dollars, in the teeth of the conclusive finding that the defendant was guilty of no negligence, and that the plaintiff had no case except from the demurrer overruled.

It is not to be understood that we are criticising any decision rendered by the Supreme Court as at present constituted. The law and practice on this subject were settled thirty-five years ago in Havens *v.* R. R. Co., 28 Conn. All that has occurred since has been simply but a development of the doctrine therein announced. The General Assembly alone can alter the rule of law in this State, which has been so long established.

The rule has worked admirably. In Connecticut, actions of negligence against corporations, private or municipal, against horse, steam or electric railway companies, and private individuals, have been tried to the court in one of the two peculiar methods above described. Nominal damages have been any where from one dollar to one hundred dollars, depending upon some process of judicial reasoning not capable of exact description or analysis. The judgment carries with it also plaintiff's costs.

The result has been a confidence on the part of such corporations and individuals that they would be fairly dealt with in

actions of this character, and that their property would not be imperilled by the uncertainty of jury trials. There can be no question about the superiority of a trial by the court instead of by the jury in actions of this character, if the attainment of justice is to be regarded.

So, also, the General Assembly has sustained the peculiar law and practice of the State which I have attempted to describe. Efforts have been made in the General Assembly to cause this whole system to be overthrown, yet such efforts have always come to nothing.

It may be confidently asserted that the rule and practice will rather be extended than contracted.

In establishing the law and practice in this State in hearings in damages on default or demurrer overruled in actions in tort for unliquidated damages, our Supreme Court has accomplished very beneficial results by the use of something closely akin to a "legal fiction."

There is nothing strange in this regard. The use of "fiction" in the English courts has been frequent and salutary.

Moreover Connecticut always has been and still is a State noted for invention.

John W. Alling.